No. 14,608

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN LEE,

Appellant,

vs.

EDWIN B. SWOPE, Warden, or his Successor, United States Penitentiary, Alcatraz, California,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

The jurisdiction of this Court arises under Section 2255, Title 28, U.S.C.A. in that the petitioner under and by order of the authority of the United States is in the custody of Edwin B. Swope, Warden, United States Penitentiary, Alcatraz, California under and by virtue of the judgment and sentence of a General Court-martial approved on the 28th day of March, 1947, as modified by an order of the Secretary of the Army on the 16th day of April 1949, sentencing peti-

tioner to a term of 20 years for armed robbery committed in France while petitioner was a member of the Army of the United States. Upon completion of such sentence petitioner will begin serving a life sentence, the result of a second General Court-martial conviction of September 13, 1949.

STATEMENT OF CASE.

Respondent, Edwin B. Swope, is the Warden of of the United States Penitentiary at Alcatraz, California and the person exercising general custodial authority over said institution and over the person of the petitioner herein.

Appellant was inducted into the Army of the United States at Washington County, Pennsylvania on December 4, 1942 for the duration of the war and six months and was given the Army Serial Number 33402971. On May 27, 1946 he was convicted by General Court-martial of armed robbery as set forth in paragraph I above. On June 12, 1947 he was dishonorably discharged from the Army of the United States and about the same time he was returned from overseas to confinement at the United States Army Disciplinary Barracks at Camp Cooke, California.

On September 13, 1949 petitioner was convicted of conspiracy to commit murder and was sentenced to death; later commuted to life imprisonment; said trial arising out of an incident which took place while petitioner was a prisoner at Camp Cooke, California.

On October 18, 1954 petitioner filed a petition for writ of habeas corpus in the United States District Court, Northern District of California, Southern Division, at San Francisco, California, being Civil Action No. 34131 (App. 2A) and an order to show cause was issued on the same date directed to United States Attorney and hearing on such was set for October the 21st, 1954.

On October 20, 1954 the United States Attorney, Lloyd H. Burke by Richard H. Foster, Assistant United States Attorney filed a return to order to show cause. (App. 10A.)

On October 21, 1954, a hearing on the order to show cause and the return thereto was had before the Honorable Oliver J. Carter, United States District Judge, at which time the respondent through his attorney, Richard H. Foster, argued that the petition for habeas corpus was premature inasmuch as the first General Court-martial conviction which sentenced petitioner to a term of 20 years would not expire, with past good time credit, until October 24, 1960 at which time petitioner would commence the life sentence, arising out of the second General Court-martial conviction of September 13, 1949, and that since petitioner was attacking the validity of the second conviction only, the Court was without jurisdiction since even if petitioner prevailed in such petition it could not result in his immediate release.

On October 22, 1954 the Honorable Oliver J. Carter, United States District Judge, entered a memorandum and order dismissing petitioner's petition for a writ

of habeas corpus without prejudice, and discharging the order to show cause. (App. 13A.)

SPECIFICATION OF ERRORS.

The Court below erred when it dismissed petitioner's petition for a writ of habeas corpus as having been prematurely brought and when it refused to take jurisdiction of the case at bar. The Court's refusal to pass on the merits of the case at bar, thus forcing an adjournment of the hearing on the merits for at lease six years, amounts to a denial of due process and a fair and speedy trial in violation of the 5th and 6th Amendments to the United States Constitution.

POINTS RELIED UPON BY APPELLANTS.

The second Army General Court-martial which convicted petitioner on September 13, 1949, at Camp Cooke, California, and sentenced him to death, later commuted to life imprisonment, was without legal jurisdiction to try petitioner inasmuch as he had been discharged from the Army on June 12, 1947 and had been a civilian in custody of the Army authorities, but not under Army jurisdiction for more than two years before the events took place which gave rise to the second court-martial.

This petition and appeal is brought to have the second court-martial conviction set aside and to have petitioner tried in the Federal District Court of Cali-

fornia for this alleged offense in keeping with his constitutional right under the Sixth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT.

The Court below erred when it refused to take jurisdiction of the case at bar so as to inquire into the validity of the second General Court-martial which petitioner was attacking in his petition for writ of habeas corpus. Inasmuch as petitioner had exhausted his appellate remedies before filing the petition for a writ of habeas corpus, the Court's refusal to take jurisdiction had the effect of forcing an adjournment of a hearing on the merits of the second conviction to a date six years or more in the future thus having the effect of denying petitioner due process and a speedy and fair trial in contravention of his rights under the Fifth and Sixth Amendments to the United States Constitution.

ARGUMENT.

The Court below should have been governed by the recent cases of *Gutterman v. Hiatt, Warden,* 65 F. Supp. 285 decided April 24, 1946 and *Albert Joblonowski, Petitioner v. State of New Jersey,* 29 N.J.S. 114, 102 A. 2d 59, decided December 4, 1953 wherein both Courts took jurisdiction to pass on the merits of the petitioner's petition for a writ of habeas corpus even though the petitioner was serving more than one

sentence and even though a favorable ruling for petitioner as to the sentence which he was attacking in his petition could not result in his immediate release. In the *Gutterman* case (supra) the Court did inquire into the merits of both sentences which were to run consecutively although the petition was brought several years before the second sentence had started to run. The Court said "In the instant case, however, we have considered petitioner's contentions as to both sentences in order that he may be fully advised in relation thereto." The Court denied petitioner's petition when it found that in each trial there had been only procedural error and not such jurisdictional error as would constitute a denial of due process under the Fifth or Sixth Amendments to the United States Constitution.

The Court in deciding the *Gutterman* case referred to its predecessor, *United States ex rel. Pruitt v. Hiatt, Warden,* 55 F. Supp. 993, decided July 17, 1944, wherein the Court had been confronted with a petition for a writ of habeas corpus and there were two consecutive sentences involved although petitioner in his petition was attacking only one of the sentences and hence even if jurisdictional error were shown as to the sentence attacked it could not have resulted in the petitioner's immediate release. However, the Court did take jurisdiction to inquire into the merits of the trials which resulted in both convictions and in ruling that there was mere procedural error and not jurisdictional error. The Court said, "In the instant case, however, we have considered petitioner's

contentions as to both sentences in order that he may be fully advised in relation thereto". The Court had recognized the rule as laid down in the *Pruitt* case, supra, but had actually taken jurisdiction to pass on the merits of the petition even though it could not have resulted in the petitioner's immediate release.

The same issue was decided in the New Jersey Supreme Court in the *Joblonowski* case, supra, decided approximately seven years later than the *Gutterman* case. In the *Joblonowski* case, decided December 4, 1953, the New Jersey Supreme Court was confronted with the same issues as had already been passed on in the *Pruitt* and *Gutterman* cases. After a discussion of both the *Pruitt* and *Gutterman* cases and their companion cases, the New Jersey Supreme Court said, "However, we think the prisoner should be entitled to some remedy now; evidence may be lost, witnesses may die or their memories fail, or the delay may work some other prejudice resulting in a denial of relief (*State v. Ballard,* 15 N.J. Super. 417, 422 (Appellate Div. 1951) Affirmed 9 N.J. 402. *Commonwealth ex rel. Quinn v. Smith,* 144 Pa. Super. 160, 191 F. 2d 504 (Supreme Court 1941)—hence in our view the better rule is that the writ is available to discharge him from confinement under the second sentence, even though he may actually remain in confinement by virtue of the third sentence". In the *Joblonowski* case there were four consecutive sentences involved and the petitioner was serving the first sentence at the time he brought the petition for habeas corpus attacking the second sentence.

In the case at bar it appears that the earliest possible date when petitioner could be freed from the first sentence would be on October 24, 1960 which is approximately six years in the future. To force an adjournment of a hearing on the merits of this second General Court-martial conviction for six years or possibly more into the future would very likely have the effect of resulting in a denial of due process and of the right to a speedy trial and the confrontation of the witnesses in violation of the Fifth and Sixth Amendments to the United States Constitution.

The second Army Court-martial which convicted petitioner on September 13, 1949 of conspiracy to commit murder and sentenced petitioner to death, later commuted to life imprisonment by the Secretary of the Army, was without legal jurisdiction to try the petitioner and hence the conviction and sentence rendered by such Court-martial is a nullity. On June 12, 1947, petitioner was discharged from the Army. At that time he became a "civilian", because his service with the Army was termintaed as of that date. He was no longer a member of the Army and his legal status was again that of a civilian so as to bring him within his guaranteed rights under the Sixth Amendment to the United States Constitution. It is true that he was still in the custody of the Army authorities on June 10, 1949 when the event took place which gave rise to the second court-martial conviction. But he was a "civilian" in the custody of the Army, in time of peace, and as such was not within

the "land and naval forces" so as to exclude him from his constitutionally guaranteed rights under the Sixth Amendment.

The case at bar is much akin to the case of *United States ex rel. Flannery v. Commanding General Second Service Command, et al.,* 69 F. Supp. 661 (1946) wherein a soldier who had been employed by the United States Secret Service, prior to his induction into the Army in 1943, secured a discharge from the Army on September 24, 1945 under a special Army authority which granted such discharges in the interest of the "national health, safety or interest". When he filed his application for such discharge he held out that he planned to return to the Secret Service. The discharge which he was given did not entitle him to any mustering-out pay, but at his separation center he filed for and received mustering-out pay to which he was not entitled under his "hardship" discharge. On January 29, 1946 he was detained by the Army and arraigned before a court-martial on the charge that he had defrauded the government in that he had represented that he had intended to return to the Secret Service whereas he never had any intention to do so and in that he had committed a fraud to which he was not entitled for the type of discharge which he had received.

The Army contended that under Art. 38, 10 U.S. C.A., they retained jurisdiction to try the accused even though he had been discharged from the Army because he had committed a fraud against the Army

when he made false representations to secure his discharge.

The Court recognized that the only legal issue was whether the Army still had jurisdiction over the accused (citing *Matter of the Application of General Tomoyuki Yamashita,* 327 U.S. 1, 66 S.Ct. 340).

After making a lengthy discussion of the rights guaranteed to a person "except in cases arising in the land or naval forces", Amendment 5, U.S.C.A. and to the rights of the "accused" under the Sixth Amendment, the Court said, "A person discharged from his contract for military service who renders no military service, performs no military duty and receives no military pay is a "civilian"—"The constitutional provision for protection of life, liberty and property should be liberally construed in favor of the citizen"—A "case has not arisen in the land forces" within the constitutional requirement of presentment or indictment of grand jury in prosecutions for capital or infamous crimes except in "cases arising in land and naval forces if the soldier is discharged before the complaint is framed and the arrest is made."

In making its decision the Court said, "The least that can be attributed to this assumption ('while serving') is that it is presently an open question whether a discharged soldier can be tried by court-martial under the statute we are discussing. We feel obliged by the authorities we have cited, *Ex parte Milligan,* 4 Wall. 2, 18 L.Ed. 281; *Matter of Quinn,* 317 U.S. 1 (see also *Mosher v. Hunter,* 10 Cir., 143

F. 2d 745) to hold that the respondent's court-martial has no jurisdiction of the relator."

The rule laid down in the *Flannery* case, supra, is certainly applicable to the case at bar except that in the *Flannery* case the accused took an active part in securing the discharge by allegedly making false representations. If a fraud was committed by the soldier there is no question but that it was committed while he was in the Army and subject to the jurisdiction of the Army. But the Court ruled, in effect, that the Army had lost jurisdiction over the man when the discharge was executed. In the case at bar the accused had no part in the securing of the discharge, which was executed on June 12, 1947, other than that he received it. It was two years later that the act was committed for which the accused in this case was given the second court-martial. We submit that if the Army had lost jurisdiction over the person in the *Flannery* case, supra, then it would seem to follow as a matter of law that the Army had no jurisdiction to try Lee for an act which was committed two years after the execution of a discharge which was given by the Army and in which Lee took no part.

CONCLUSION.

It is respectfully submitted that, for the reasons stated herein, the judgment of the District Court should be reversed and the case remanded to that

Court with instructions to pass on the jurisdictional question in the case at bar.

Dated, February 18, 1955.

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